

**STATE BOARD OF EQUALIZATION**STATE OF CALIFORNIA
BOARD OF EQUALIZATIONIn the Matter of the Petition for
Redetermination Under the Sales
and Use Tax LawDECISION AND RECOMMENDATION
OF HEARING OFFICERX-----
Petitioner

The above entitled matter came on regularly for hearing on Thursday, July 31, 1980, in West Los Angeles, California. James E. Mahler, Hearing Officer.

Appearing for Petitioner: X-----
X-----Appearing for the Board: X-----
AuditorProtest

Petitioner protests a determination of sales and use tax deficiency for the period July 1, 1971, through December 31, 1973. the protested taxes are measured by:

<u>Audit Item</u>	<u>State, Local and County</u>
A. Lease of fixtures and equipment.	\$72,668
B. Sales of off-lease fixtures and equipment.	<u>\$215,000</u>
	\$287,668

Contentions

1. Petitioner was not a retailer and was not required to hold a seller's permit.

2. The lease was an exempt occasional sale.
3. The sale was an exempt occasional sale.
4. Petitioner is not subject to the Board's jurisdiction
5. The determination is barred by the statute of limitations.
6. Some of the items which the audit classes as "fixtures and equipment" were not tangible personal property.
7. The failure to file returns was due to reasonable cause and not willful neglect.

Summary

Petitioner is a partnership organized under Michigan law with its main office in Illinois. Its principal business is buying real property for long term investment purposes and then leasing the property. It did not have a California seller's permit or file California sales and use tax returns during the period in question.

In June or July 1971, petitioner purchased the assets of a hotel with a bar and restaurant in X-----, California. It appears that the hotel had formerly been owned by a corporation whose stock was held by some of petitioner's partners. However, petitioner bought the hotel from a finance company which had acquired it by foreclosure or repossession. Although the hotel assets included some tangible personal property in addition to the realty, petitioner did not pay sales tax reimbursement to the seller or use tax to the state with respect to the purchase.

The price paid by petitioner was a lump sum with no allocation between the real and tangible personal property. For property tax purposes, however, the local County Assessor determined that 6.93 percent of the price was paid for "personal property." Apparently this determination was based on petitioner's own calculation of the basis of depreciable assets for income tax purposes.

Simultaneously with the purchase or soon thereafter, petitioner leased all the assets to the same corporation that had previously owned the hotel. Although the lease agreement expressly included the personal property used in the hotel business, the lease payments were not allocated between the real and tangible personal property. The corporation was given full authority and responsibility for operating the business and presumably held a seller's permit for such operations.

In December 1973, petitioner sold all the hotel assets to an unrelated company. Exhibit B to the sale agreement provided that \$215,000, or about 5.51 percent of the total sales price, was allocable to "furniture, fixtures and equipment." That term was defined in Exhibit B to include many items which are clearly tangible personal property, such as

bedding and silverware, as well as many items which mayor may not have been affixed to realty, such as refrigerators and ice machines.

The parties agree that petitioner did not lease or otherwise sell any property in California except the hotel assets during the period in question. However, there is disagreement concerning petitioner's operations outside this state. The audit work papers state that petitioner was leasing property in both Florida and Illinois, but do not state whether the property was real or personal. Petitioner states that its only lease outside California was a warehouse in Illinois, and that that lease did not involve any tangible personal property.

The audit asserted tax on petitioner's lease of the tangible personal property included in the hotel assets. The lease payments were allocated between the tangible and other assets to determine the measure of tax. The County Assessor's 6.93 percent allocation of the original purchase price was used to allocate the lease payments.

The audit also asserted tax on petitioner's subsequent sale of the hotel assets measured by the agreed selling price of "furniture, fixtures and equipment.

Analysis and Conclusions

1. The initial question is whether petitioner was a seller required to hold a seller's permit.

Revenue and Taxation Code section 6066 requires a permit application from "[e]very person desiring to engage in or conduct business as a seller within this state" The term "business" is defined in section 6013 of the Code to include "any activity engaged in by any Person or caused to be engaged in by him with the object of gain, benefit, or advantage, either direct or indirect." Section 6014 defines "seller" to include "every person engaged in the business of selling tangible personal property of a kind the gross receipts from the retail sale of which are required to be included in the measure of the sales tax." In addition, Sales and Use Tax Regulation 1595(a) (1) provides:

Generally, a person who makes three or more sales for substantial amounts in a period of 12 months is required to hold a seller's permit. A person who makes a substantial number of sales for relatively small amounts is also required to hold a seller's permit.

Petitioner points out that section 6006.1 of the Code provides that a lease is a "continuing sale" in the singular and not "sales" in the plural. Therefore, petitioner argues, it made only two sales during the entire audit period, namely, the lease of the hotel assets and the subsequent sale of those assets. Petitioner concludes that it was not a seller required to hold a permit because it did not make three or more sales in any 12 month period.

We agree that petitioner made only the two sales in California during the audit period. For purposes of this report, we also accept as true the allegation that petitioner was not leasing or otherwise selling tangible personal property in any other state. However, we cannot agree that a person who makes less than three sales is necessarily exempt from the permit holding requirement. Under section 6066, a person must hold a permit if he is "engaged in business" as a seller, regardless of the number of sales. For example, a person who is in the business of building and selling boats is a seller required to hold a permit, even though he may sell only one or two boats per year.

In this case, we conclude that petitioner was engaged in the business of leasing tangible personal property. The lease of the hotel assets, including the tangible personal property, was unquestionably entered into with the object of gain, benefit or advantage, and this comes precisely within the statutory definition of "business." The on-going nature of the lease also indicates that it was a business activity rather than a casual or isolated transaction. In short, while leasing tangible personal property may not have been petitioner's principal business, it was nevertheless a business activity and required the holding of a seller's permit.

The above quoted provisions of Regulation 1595 (a) (1) are not to the contrary. The regulation states that persons who make three or more sales are "generally" required to hold a permit. It does not state that persons who make fewer sales are necessarily exempt from the permit holding requirement.

Finally, we are aware that a single lease is not considered a business activity under the laws of Alabama and Arizona. (State of Alabama v. GM&O Land Co., 275 So. 2d 687; Arizona, et al. v. Selby, 544 P.2d 717.) However, we do not find these decisions persuasive authority for interpreting California law. We also note that Ohio and New Jersey do consider a single lease to be a business. (Hayes-Albion Corp. v. Kosydar, Ohio Board of Tax Appeals, May 21, 1975; New Jersey State Tax News, April-May 1974 [2 CCH New Jersey Tax Reporter ,60-236.50].)

2. In relevant part, Revenue and Taxation Code section 6006.5(a) defines "occasional sale" to include a "sale of property not held or used by a seller in the course of activities for which he is required to hold a seller's permit" Since petitioner's lease of the hotel assets required the holding of a seller's permit, the lease was not an occasional sale under this section. No contention has been raised that the lease would qualify under section 6006.5(b).
3. For the same reasons, petitioner's sale of the hotel assets was not an occasional sale.
4. Petitioner owned a hotel and was engaged in a leasing business in California. These facts provide a sufficient nexus for taxation.
5. Revenue and Taxation Code section 6487 provides that in the case of failure to file returns, the notice of determination shall be mailed "within eight years after

the last day of the calendar month following the quarterly period for which the amount is proposed to be determined." Since petitioner did not file returns, the eight year period applies. The first quarterly period in the determination is 3Q71, and the last day of the following month was October 31, 1971. The determination was issued on October 24, 1979, and is therefore timely.

6. The measure of tax on the lease is based on the County Assessor's allocation of the original purchase price. According to petitioner, this allocation is in turn based on its own calculation of the basis of depreciable assets for income tax purposes. Petitioner alleges that the calculation included several items which were depreciable but which should not be considered tangible personal property for sales and use tax purposes. Petitioner lists central air conditioning units and television sets affixed to the realty as examples of such property, but no evidence has been presented.

Absent evidence to the contrary, we have no choice but to accept the audit's allocation of the lease and sale prices. Petitioner will be allowed 30 days from mailing of this report to submit evidence from which a better allocation can be made.

7. Petitioner has submitted the statement required by Revenue and Taxation Code section 6592. It is recommended that the penalty be deleted.

Recommendations

Allow petitioner 30 days to submit additional evidence. Reaudit if necessary in accordance with the evidence.

Transmit the request for the relief from the penalty to the Board with a recommendation that relief be granted.